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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TYCO INTERNATIONAL, LTD. and TYCO INTERNATIONAL (US), INC.,	:	
Plaintiffs/Counterclaim Defendants,	:	No. 02 Civ. 7317 (TPG) **ECF CASE**
v.	:	
L. DENNIS KOZLOWSKI,	:	
Defendant/Counterclaim Plaintiff.	:	

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE SUBMITTED PURSUANT TO LOCAL RULE 56.1 BY DEFENDANT/COUNTERCLAIM PLAINTIFF L. DENNIS KOZLOWSKI IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 56.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Defendant/Counterclaim Plaintiff L. Dennis Kozlowski, respectfully asserts, in support of his motion for partial summary judgment, that the following material facts are not genuinely in dispute.

Case 1:02-cv-07317-TPG Document 29 Filed 03/05/2010 Page 2 of 11

The Parties

1. Defendant/counterclaim plaintiff L. Dennis Kozlowski was the President and Chief Executive Officer of Tyco International Ltd. ("Tyco") from July 1992 through June 2002, and served as Chairman of Tyco's Board of Directors beginning in January 1993. [Ex. 11, Tyco Labs, Inc., Annual Report (Form 10-K), at 11 (Sept. 15, 1992); Ex. 5, Answer, Affirmative Defenses and Counterclaims of L. Dennis Kozlowski, Tyco Int'l, Ltd. v. Kozlowski, No. 02 Civ. 7317 (TPG) (S.D.N.Y.) (Apr. 9, 2004) ("Answer and Counterclaims"), at ¶¶ 1, 6; Ex. 6, Reply of Tyco Int'l Ltd. and TME Mgmt. Corp. to Counterclaim of L. Dennis Kozlowski, Tyco Int'l, Ltd. v. Kozlowski, No. 02 Civ. 7317 (TPG) (S.D.N.Y.) (Apr. 29, 2004) ("Tyco Reply"), at ¶ 6.][1]

2. Plaintiff/counterclaim defendant Tyco was a Bermuda corporation, "organized and exist[ing] under" the laws of Bermuda from 1997 through 2009. [Ex. 7, Bye-Laws of Tyco Int'l Ltd. (Incorporating All Amendments to 27th March, 2001) ("Bye-Laws") at 1; Ex. 4, Amended Compl., Tyco Int'l, Ltd. v. Kozlowski, No. 02 Civ. 7317 (TPG) (S.D.N.Y.) (Apr. 1, 2003) ("Amended Complaint"), at ¶ 7; Ex. 5, Answer and Counterclaims ¶ 2; Ex. 6, Tyco Reply ¶ 2; Ex. 8, Answer of TyCom and Tyco Int'l Ltd. to the Consolidated Securities Class Action Compl., Stumpf v. Garvey, 02-MDL-1335-B, Docket No. 03-CV-1352 (D.N.H.) (Jan. 13, 2006) ¶ 26; Ex. 9, Reply Mem. of Nominal Defendant Tyco Int'l Ltd. in Support of its Motion to Dismiss, Levin v. Kozlowski, Index No. 02/602113, (N.Y. Sup. Ct., County N.Y.) (July 14, 2006), at 31; Ex. 10, Reply Mem. of Nominal Defendant Tyco Int'l Ltd. in Support of its Motion to Dismiss the Second Amended Complaint, Evans v. Kozlowski, Civil Action No. 02-352-B, 02-MDL-1335-B (D.N.H.) (May 19, 2004), at 6; Ex. 13, Tyco Int'l Ltd., Transition

[1] Citations to "Ex. __" herein refer to Exhibits to the accompanying Declaration of Shannon Rose Selden.

Report (Form 10-K) (Dec. 24, 1997); Ex. 14, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 10, 1998); Ex. 15, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 13, 1999); Ex. 16, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 20, 2000); Ex. 17, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 28, 2001); Ex. 18, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 30, 2002); Ex. 52, Press Release, Tyco Int'l Ltd., Tyco International Proposes Change in Place of Incorporation from Bermuda to Switzerland, (Dec. 10, 2008); Ex. 53, Press Release, Tyco Int'l Ltd., Tyco International Shareholders Approve Proposals to Annual General Meeting and Special General Meeting, (Mar. 12, 2009).]

In addition:

a. When it was incorporated in Bermuda, Tyco's principal place of business was in Bermuda. [Ex. 13, Tyco Int'l Ltd., Transition Report (Form 10-K) (Dec. 24, 1997); Ex. 14, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 10, 1998); Ex. 15, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 13, 1999); Ex. 16, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 20, 2000); Ex. 17, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 28, 2001); Ex. 18, Tyco Int'l Ltd., Annual Report (Form 10-K) (Dec. 30, 2002).]

b. Tyco's Board of Directors held regular meetings in Bermuda. [Ex. 23, Minutes of a Regular Meeting of the Bd. of Dir. of Tyco Int'l Ltd., (July 31, 1997), at 1; Ex. 24, Minutes of a Special Meeting of the Bd. of Dir. of Tyco Int'l Ltd., (Nov. 20, 1998), at 1; Ex. 25, Minutes of a Regular Meeting of the Bd. of Dir. of Tyco Int'l Ltd., (Dec. 14, 1998), at 1; Ex. 26, Minutes of a Regular Meeting of the Bd. of Dir. of Tyco Int'l Ltd., (Apr. 18, 2000), at 1; Ex. 27, Minutes of a Regular Meeting of the Bd. of Dir.

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of Tyco Int'l Ltd., (Jan. 10, 2001), at 1; Ex. 28, Minutes of a Meeting of the Tyco Int'l Ltd. Comp. Comm., (Oct. 21, 1998), at 1; Ex. 30, Minutes of a Meeting of the Tyco Int'l Ltd. Comp. Comm., (Oct. 15, 1999), at 1.]

The Executive Retirement Agreement

3. At its October 21, 1998 meeting, the Compensation Committee of Tyco's Board of Directors (the "Compensation Committee") authorized Tyco to enter into an executive retirement agreement with Mr. Kozlowski. [Ex. 28, Minutes of a Meeting of the Tyco Int'l Ltd. Comp. Comm., (Oct. 21, 1998), at 2; see also Ex. 31, Transcript of Deposition of Stephen Foss (May 11, 2007) ("Foss 5/11/07 Dep."), at 667:19-669:4; Ex. 32, Transcript of Deposition of L. Dennis Kozlowski (Oct. 31, 2007), at 1058:24-1059:19.]

4. Tyco and Mr. Kozlowski entered into the Executive Retirement Agreement (the "ERA") effective as of October 21, 1998 and disclosed it in Tyco's Schedule 14A Proxy Statement as part of Mr. Kozlowski's compensation. [Ex. 1, Tyco Int'l, Ltd. Executive Retirement Agreement, dated as of March 1, 1999 and amended as of October 1, 1999 (the "First Amendment"); Ex. 21, Tyco Int'l Ltd., Definitive Proxy Statement (Schedule 14A), at 13 (Sept. 23, 1999).]

5. The Executive Retirement Agreement deferred a portion of the bonus earned in and otherwise payable to Mr. Kozlowski for fiscal year 1998. [Ex. 33, Foss 5/11/07 Dep., at 665:14-668:24.]

6. Section 1.1 of the ERA provides in part:

> Notwithstanding anything herein contained to the contrary, this Agreement is not an agreement of employment, and nothing herein shall be construed to give the Executive any right to remain in the employ of Tyco. Nothing herein shall restrict the right of the Executive to enter into an agreement with Tyco concerning other terms and conditions of his employment. [Ex. 1, ERA § 1.1.]

7. Article 2 of the ERA governs retirement. Section 2.1 provides:

> When the Executive attains the age of sixty-five (65) ("Normal Retirement Age"), the Executive shall be entitled to receive an executive retirement benefit, commencing on the first day of the month next following actual retirement and continuing during his lifetime, payable in monthly installments, in the annual amount of $2,728,644. [Ex. 1, ERA, § 2.1.]

8. Section 2.2 of the ERA provides:

> In lieu of the lifetime payments provided in Section 2.1, the Executive may elect an optional form which shall be a lump sum payment of the actuarial equivalent of the said lifetime payments (the "Lump Sum Amount"). The actuarial assumptions to be used to determine the actuarial equivalence shall be (i) the GAM 83 Mortality Table, and (ii) a seven percent (7%) annual rate of interest. [Ex. 1, ERA § 2.2.]

9. In October 1999, the ERA was amended to increase the amount specified in Section 2.1 to "$10,069,200." [Ex. 1, First Amendment ¶ A.] The Amendment explicitly provided that "the Executive Retirement Agreement is hereby confirmed in all other respects." [Id. ¶ B.] Tyco disclosed the amended present value of the ERA in its Proxy Statement filed March 8, 2000. [Ex. 22, Tyco Int'l Ltd., Definitive Proxy Statement (Schedule 14A), at 15 (Mar. 8, 2000).]

10. Section 3.1 of the ERA provides:

> In the event of the death of the Executive prior to his retirement or other termination of employment, the death benefit payable to the Executive's named beneficiary shall be the Lump Sum Amount.

Said death benefit shall be paid in one lump sum. If the Executive is not survived by a named beneficiary, or if the Board is in doubt as to the effective status of a beneficiary designation, then the death benefit provided by this Section 3.1 shall be payable to the Executive's estate in one lump sum. [Ex. 1, ERA § 3.1.]

11. Section 4.1 of the ERA provides:

Upon the termination of the Executive's employment with Tyco for any reason, the Executive may elect to receive his executive retirement benefit in a Lump Sum Amount. Executive is fully vested in his executive retirement benefit at all times. [Ex. 1, ERA § 4.1.]

12. Section 7.4 of the ERA provides: "This Agreement is subject to and shall be governed by the laws of Bermuda." [Ex. 1, ERA § 7.4.]

13. Section 7.6 and 7.7 of the ERA provide:

This Agreement contains the entire agreement of the parties hereto with respect to its subject matter and may be altered or amended only by a written agreement signed by the parties hereto. [Ex. 1, ERA § 7.6.]

This Agreement shall take effect as of October 1, 1998. [Ex. 1, ERA § 7.7]

14. Section 8.1 of the ERA provides:

In the event that benefits under this Agreement are not paid to the Executive or other person or persons entitled to benefits hereunder (the "Claimant"), and the Claimant feels entitled to receive them, a claim shall be made in writing to Tyco within sixty (60) days after written notice from Tyco to the Claimant that payments are not being made or are not to be made under this Agreement. Such claims shall be reviewed by Tyco. If the claim is approved or denied, in full or in part, Tyco shall provide a written notice of approval or denial within ninety (90) days setting forth the specific reason for denial, specific reference to the provisions of this Agreement upon which the denial is based, and any additional material or information necessary to perfect the claim, if any. Such written notice shall also indicate the steps to be taken if a

> review of the denial is desired. A claim shall be deemed denied if Tyco does not take any action within the aforesaid ninety (90) day period.
>
> If a claim is denied and a review is desired, the Claimant shall notify Tyco in writing within sixty (60) days of the receipt of notice of denial. In requesting a review, the Claimant may review this Agreement or any document relating to it and submit any written issues and comments he or she may feel appropriate. Tyco shall then review the claim and provide a written decision within sixty (60) days. This decision likewise shall state the specific reasons for the decision and shall include reference to specific provisions of this Agreement on which the decision is based. [Ex. 1, ERA § 8.1.]

15. According to Tyco, as of October 2008, the value of Mr. Kozlowski's ERA account was $75.9 million. [Ex. 34, Second Decl. of Matthew R.A. Heiman in Support of Motion for a Temporary Restraining Order and Preliminary Injunction, In re Tyco Int'l Ltd Sec. Litig., MDL Docket No. 02-1335-B (PJB) (D.N.H.) (Oct. 8, 2008), at ¶ 15(c).]

Tyco's Refusal to Satisfy its Payment Obligations Under the ERA

16. On June 2, 2002, Mr. Kozlowski's employment was terminated. [Ex. 5, Answer and Counterclaims ¶ 8; Ex. 6, Tyco Reply ¶ 8.]

17. Mr. Kozlowski informed Tyco by letter dated November 8, 2002 that he was electing to receive the Lump Sum Amount pursuant to Sections 4.1 and 2.2 of the Executive Retirement Agreement and demanded payment of that amount. [Ex. 35, Letter from L. Dennis Kozlowski, to the Chairman of the Comp. Comm. of Tyco Int'l Ltd., (Nov. 8, 2002).]

18. Tyco refused to pay Mr. Kozlowski under the ERA. [Ex. 36, Letter from Jane F. Greenman on behalf of the Special Appeals Comm., Tyco Int'l (US) Inc., to L. Dennis Kozlowski, (May 13, 2004) (delivered May 17, 2004), at 3.]

19. Mr. Kozlowski timely requested review of Tyco's denial of payment. [Ex. 37, Letter from Robert N. Shwartz on behalf of L. Dennis Kozlowski, to the Special Appeals Comm., Tyco Int'l (US) Inc., (July 15, 2004).]

20. Mr. Kozlowski asked Tyco to place the amounts at issue under the ERA and other contracts in escrow pending resolution of this dispute. [Id. at 4; Ex. 38, Letter from Robert N. Shwartz on behalf of L. Dennis Kozlowski, to the Special Appeals Comm., Tyco Int'l (US) Inc., (Aug. 3, 2004).]

21. Tyco refused to escrow the amounts requested. [Ex. 39, Letter from Jane F. Greenman on behalf of the Special Appeals Comm., Tyco Int'l (US) Inc., to Robert N. Shwartz, (July 27, 2004); Ex. 40, Letter from Jane F. Greenman on behalf of the Special Appeals Comm., Tyco Int'l (US) Inc., to Robert N. Shwartz, (Aug. 13, 2004).]

22. By letter dated September 15, 2005, Tyco denied Mr. Kozlowski's appeal and again refused to make any payment pursuant to the ERA. [Ex. 41, Letter from Jane F. Greenman on behalf of the Special Appeals Comm., Tyco Int'l (US) Inc., to L. Dennis Kozlowski, (Sept. 15, 2005).]

Indemnification Under Tyco's Bye-Laws for *Stumpf v. Garvey*

23. In Stumpf v. Garvey, shareholders of TyCom Ltd. ("TyCom"), a telecommunications subsidiary of Tyco engaged in the undersea cable business, filed suit against Tyco, TyCom, Mr. Kozlowski and others alleging that the defendants were liable for alleged misstatements in the prospectus and registration statement filed in connection with TyCom's Initial Public Offering in 2000. [Ex. 45, Stumpf v. Garvey, No. 03 Civ. 1532 (PB), 2005 WL

Case 1:02-cv-07317-TPG Document 29 Filed 03/05/2010 Page 9 of 11

2127674, at **1-3 (D.N.H. Sept. 2, 2005).] After partial motions to dismiss were granted the "[p]laintiffs' claims were narrowed significantly" and now involve nothing but allegations "regarding the demand for and supply of undersea bandwidth." [Ex. 43, Defendants Tyco Int'l Ltd. and TyCom Ltd.'s Mem. in Support of their Motion for Summary Judgment, Stumpf v. Garvey, 3:03-cv-03540 (GEB) (DEA) (D.N.J.) (May 29, 2009) ("Tyco Stumpf Brief"), at 9.]

24. The Court previously struck all claims against Mr. Kozlowski and Tyco related to "looting" from the action, granting in part the defendants' motions to dismiss. [Ex. 45, Stumpf v. Garvey, No. 03 Civ. 1532 (PB), 2005 WL 2127674, at *12 n. 14 (D.N.H. Sept. 2, 2005); Ex. 46, Stumpf v. Garvey, No. 03 Civ. 1532 (PB), 2006 WL 39237, at *1, (D.N.H. Jan. 6, 2006); Ex. 43, Tyco Stumpf Br. at 8-9.]

25. In the Stumpf action, Tyco, TyCom and Mr. Kozlowski moved for summary judgment on each of the plaintiffs' remaining claims against them, consisting of the claims relating to statements regarding the demand for bandwidth and alleged under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k & 77o, and under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, 15 U.S.C. §§ 78j & 78t, 17 C.F.R. § 240.10b-5. [Ex. 43, Tyco Stumpf Brief, at 5-6, 11-12; Ex. 44, Mem. of Law of Defendant L. Dennis Kozlowski in Support of his Motion for Summary Judgment, Stumpf v. Garvey, 3:03-cv-03540 (GEB) (DEA) (D.N.J.) (June 12, 2009) ("Kozlowski Stumpf Brief"), at 1-2.]

26. In moving for summary judgment, Tyco and Mr. Kozlowski agreed that the remaining claims in Stumpf are not related to any "looting" of Tyco by Mr. Kozlowski. [Ex. 43, Tyco Stumpf Brief, at 3, 19; Ex. 44, Kozlowski Stumpf Brief, at 3.] In its brief, Tyco argued

that whether or not "Kozlowski and Swartz took unauthorized payments from *Tyco* months *after* the TyCom IPO has no bearing on whether TyCom knew projections" regarding demand for undersea cable were sound. [Ex. 43, Tyco Stumpf Brief, at 19.] The Stumpf plaintiffs' only remaining claims involving fraud or dishonesty relate to purported misrepresentations in the registration statement and prospectus, which plaintiffs allege caused them to suffer damages "when, independent of the general telecom decline, their share price dropped because the market learned in early 2001 that predictions in TyCom's July 2000 IPO Prospectus about future bandwidth demand were false." [Id. at 8.]

27. Tyco's Bye-Laws mandate indemnification of officers and directors to the full extent permitted under Bermuda law. Section 102 of the Bye-Laws states:

> Every Director, Secretary and other officer of the Company shall be indemnified by the Company against, and it shall be the duty of the Directors out of the funds of the Company to pay, all costs, losses and expenses which any such officer may incur or become liable to by reason of any contract entered into, or any act or thing done by him as such officer, or in any way in the discharge of his duties Provided always that the indemnity contained in this Bye-Law shall not extend to any matter which would render it void pursuant to the Companies Acts.
>
> [Ex. 7, Bye-Laws, at 41.]

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28. Mr. Kozlowski has requested indemnification from Tyco for the costs incurred in his defense of the Stumpf action, but Tyco has not agreed to indemnify. [See, e.g., Ex. 42, Letter from Robert Shwartz on behalf of L. Dennis Kozlowski, to Elizabeth F. Edwards, Esq., (Dec. 19, 2008).]

Dated: March 5, 2010
New York, NY

Respectfully submitted,

/s/ [Jyotin Hamid]__________

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